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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 576

SAMUEL OKIN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION IN OPPOSITION**

OPINIONS BELOW

The opinion of the district court (R. 41-45) is reported in 46 F. Supp. 481.

The per curiam decision of the Circuit Court of Appeals for the Second Circuit, affirming the order of the District Court on the basis of the opinion below (R. 50), is reported in 130 F. (2d) 903.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on October 27, 1942 (R. 50-51). The pe-

tition for a writ of certiorari was filed on December 9, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the district court had jurisdiction over a suit by petitioner, a stockholder of a registered holding company, against the Commission, to enjoin the Commission from enforcing its rule and from preventing the company from purchasing its own stock, and to obtain a declaration that the rule is invalid.

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 (hereinafter referred to as the "Act") are set out in the Appendix.

STATEMENT

The facts in this case, which are not in dispute, may be summarized as follows:

Petitioner, who owns 9,000 shares of common stock of Electric Bond and Share Company (a registered holding company), filed a complaint (R. 3-11) in the District Court for the Southern District of New York, seeking to enjoin the Commission from preventing the company from purchasing its own preferred stock, to enjoin the enforcement of Rule U-42 (see Appendix, *infra*, p. 11) as applied to Electric Bond and Share

Company, and to obtain a declaration that Rule U-42 is null and void and beyond the powers of the Commission under the Act.

Rule U-42 was adopted by the Commission pursuant to Section 12 (c) of the Act. The rule provides, in pertinent part, that no registered holding company shall acquire, retire, or redeem any of its own securities except pursuant to a declaration filed with the Commission in accordance with the procedural provisions of Rule U-23 (*infra*, pp. 11-13) and an order of the Commission. Electric Bond and Share Company filed a declaration with the Commission stating its intention to use \$5,000,000 of cash on hand to purchase its outstanding preferred stock. The Commission thereafter issued an order pursuant to Section 12 (c) and Rule U-42 permitting the declaration to become effective in respect of \$2,000,000, reserving jurisdiction in respect of the remaining \$3,000,000 and suggesting that the company formulate an exchange plan or plans for the distribution of its assets to its preferred stockholders (R. 10).

In the district court the Commission moved to dismiss petitioner's action for lack of jurisdiction (R. 24-25). The district judge entered an order (R. 45) denying petitioner's motion for a temporary injunction and granting the Commission's motion to dismiss (R. 41-45). The circuit court of appeals affirmed, without opinion (R. 50).

ARGUMENT

The decision of the court below is correct and presents no conflict. Petitioner has mistaken his remedy; his suit against the Commission in the district court was foreclosed by established and fundamental principles of jurisdiction to review administrative action.

1. Section 24 (a) of the Act provides the method for judicial review of the Commission's orders. It prescribes the familiar procedure of a petition by any person or party aggrieved to the appropriate circuit court of appeals. Congress thus has specified an exclusive method for review of the Commission's orders, and petitioner was accordingly foreclosed from obtaining review by a different path.¹ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375.

2. In any event, the actions of the Commission attacked by petitioner have no such impact as entitles him to judicial review. Neither Rule U-42 nor the Commission's order is reviewable at this stage. Rule U-42 neither requires nor finally for-

¹ Plainly the provisions of Section 25 of the Act relating to suits to enjoin violations of the Act and referring to costs "against" the Commission do not, as petitioner contends (Pet. 18-19), authorize an alternative method of review by injunction in the district courts. The reference to suits to enjoin violations relates to suits by the Commission; the reference to costs relates to suits brought against the Commission in the circuit courts of appeals under Section 24 (a).

bids any action. It merely imposes as a condition precedent to the taking of certain action that Commission approval be obtained. Only if the Commission issued an order pursuant to this rule denying effectiveness to a declaration could there be any prejudicial effect upon those subject to it. No such order has here been entered. Therefore, in contrast to the situation presented in *Columbia Broadcasting System, Inc., v. United States*, 316 U. S. 407, 420, there is here further administrative action to be taken before the rule has legal impact and the rule does not "determine in advance the rights of others affected by it."

It follows that the gravamen of petitioner's complaint is not the existence or enforcement of the procedural Rule U-42. Rather it is the alleged injury to him as a common stockholder resulting from the Commission's order issued pursuant to Section 12 (c) of the Act and Rule U-42, insofar as it reserved jurisdiction with respect to the use of the remaining \$3,000,000 in the purchase of preferred stock of Electric Bond and Share Company. But this order, in turn, is not final. To the extent that it reserved jurisdiction as to the use of the \$3,000,000, the order was interlocutory in character and hence nonreviewable under Section 24 (a). Congress has provided for review only of final orders in the circuit courts of appeals and any alleged injuries incident to the issuance of interlocutory orders are deemed remediable only on such review. *Federal Power Commission*

v. *Metropolitan Edison Co.*, 304 U. S. 375; *Bradley Lumber Co. v. National Labor Relations Board*, 84 F. (2d) 97 (C. C. A. 5), certiorari denied, 299 U. S. 559. Petitioner's claim of alleged injury creates no jurisdiction outside the statutory scheme and does not justify interference by a district court with the orderly procedure prescribed by Congress, thus forestalling the entry of a final order by the Commission. Cf. *Federal Power Commission v. Metropolitan Edison Co.*, *supra*, at p. 385; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52; *United States v. Griffin*, 303 U. S. 226, 237; *United States v. Los Angeles & Salt Lake R. R.*, 273 U. S. 299, 314.

3. Petitioner was additionally precluded since his suit was against the Commission itself. The United States and its agencies may be sued only with the consent of Congress. *Nassau Smelting & Refining Works, Ltd., v. United States*, 266 U. S. 101, 106; *Schillinger v. United States*, 155 U. S. 163, 166; *Securities and Exchange Commission v. Andrews*, 88 F. (2d) 441 (C. C. A. 2). Here, Section 24 (a) of the Act, providing for review of orders by the circuit courts of appeals, embodies the only consent given by Congress to a suit against the Commission.²

² Congress has expressly consented to actions in district courts to enforce, enjoin, set aside, annul, or suspend orders of the Interstate Commerce Commission and the Federal Communications Commission. Urgent Deficiencies Act, 28 U. S. C. 48; Communications Act of 1934, 47 U. S. C. 402 (a).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

RICHARD S. SALANT,
Attorney.

JOHN F. DAVIS,
Solicitor,

HOMER KRIPKE,
Assistant Solicitor.

EUGENE GRESSMAN,
SEYMOUR KLEINMAN,
Attorneys,
Securities and Exchange Commission.

JANUARY 1943.

Petitioner's reliance, therefore, on such cases as *Interstate Commerce Commission v. United States ex rel. Humbolt Steamship Company*, 224 U. S. 474 (Pet. 15-16) and *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407 (Pet. 19-20) is misplaced. Other cases cited by petitioner involved suits against individuals, not against the United States or an agency. See *Hammond-Knowlton v. United States*, 121 F. (2d) 192, 194 (C. C. A. 2). In *Electric Bond and Share Company et al. v. Securities and Exchange Commission*, 303 U. S. 419, relied upon by petitioner (Pet. 15), the district court granted the Commission's motion to dismiss, for lack of jurisdiction, the company's cross-bill to enjoin the Commission itself from enforcing the Public Utility Holding Company Act. The basis of the motion was the contention that the Commission could not be sued because Congress had not consented to such an action against the Commission. This aspect of the district court's action was not appealed by the company and hence was not before this Court for review. This Court considered the cross-bill only as it applied to individual defendants.